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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LOREN JAMES HOELSCHER, Defendant and Appellant.	E065077 (Super.Ct.No. CR35168) OPINION

APPEAL from the Superior Court of Riverside County. Becky Dugan, Judge. Affirmed.

John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Minh U. Le, Deputy Attorneys General, for Plaintiff and Respondent.

In 1990, a jury found defendant and appellant Loren James Hoelscher guilty of receiving stolen property, to wit, a 1980 Toyota pickup truck, in violation of former Penal Code section 496.[1] After California voters passed Proposition 47, which among other things converted the crime of receiving stolen property to a misdemeanor where the value of the stolen property did not exceed $950 (§§ 496, subd. (a), 490.2, subd. (a)), defendant petitioned to have his felony conviction designated a misdemeanor (§ 1170.18). The trial court denied his petition, finding that defendant had not established his eligibility for the reduction of his offense to a misdemeanor. Defendant appeals, arguing that the trial court erred in ruling that he, not the People, had the burden of establishing eligibility for Proposition 47 relief regarding the value of the stolen truck. We disagree and will affirm the order. The affirmance is without prejudice, in the event defendant wants to file a new petition in which he may attempt to meet his initial burden of demonstrating entitlement to relief under Proposition 47.

I

FACTUAL AND PROCEDURAL BACKGROUND

By felony information filed on April 16, 1990, defendant was charged with one count of receiving stolen property in violation of former section 496; property identified in the information as a 1980 Toyota pickup truck. The information further alleged that defendant had suffered one prior prison term within the meaning of section 667.5, subdivision (b).

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[1] All future statutory references are to the Penal Code unless otherwise stated.

On July 5, 1990, a jury found defendant guilty as charged. It was also found true that defendant had suffered a prior prison term (§ 667.5, subd. (b)). On August 2, 1990, defendant was sentenced to a total term of three years in state prison.

On May 6, 2015, after defendant completed serving his sentence, he filed a petition to have his felony conviction designated as a misdemeanor pursuant to section 1170.18, subdivision (f).

A hearing on defendant's petition was held on November 20, 2015. At that time, the prosecutor indicated to the court that the stolen property was "a 1980 Toyota according to the police report [*sic*] the case is from 1989 and it was worth approximately $5,000."[2] Defendant provided no evidence on the value of the stolen truck. The trial court found that defendant did not "meet [his] burden to show that it was under $950" and denied the petition.

Defendant timely appealed.

II

DISCUSSION

On November 4, 2014, voters approved Proposition 47, the Safe Neighborhood and Schools Act, which became effective November 5, 2014. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) Proposition 47 reduced certain drug- and theft-related crimes from felonies or wobblers to misdemeanors for qualified defendants and added,

[2] The police reports do not contain any evidence as to the value of the truck. The sections in the two police reports, sections 58 and 59, marked as "Stolen Auto Value" and "Recovered Auto Value," respectively, are blank.

among other statutory provisions, sections 1170.18 and 490.2.[3] Section 1170.18 creates a process permitting persons previously convicted of crimes as felonies, which might be misdemeanors under the new definitions in Proposition 47, to petition for resentencing. Under sections 1170.18, subdivision (a), and 490.2, receiving stolen property (§ 496, subd. (a))[4] is an offense that qualifies for resentencing if the value of the property is less than $950.

Section 1170.18, subdivision (f) provides: "A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors." And, subdivision (g) provides that "If the application satisfies the criteria in subdivision (f), the court shall designate the felony offense or offenses as a misdemeanor."

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[3] Section 490.2, subdivision (a), provides: "Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft . . . ."

[4] After Proposition 47, section 496, subdivision (a), was amended to read: "Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a county jail for not more than one year, or imprisonment pursuant to subdivision (h) of Section 1170. However, if the value of the property does not exceed nine hundred fifty dollars ($950), the offense shall be a misdemeanor . . . ."

As noted, defendant unsuccessfully petitioned for resentencing in accordance with Proposition 47. He now contends the ruling was erroneous because the trial court improperly allocated the burden of proof to defendant and the evidence failed to show the property he possessed was worth more than $950.

We review a trial court's "legal conclusions de novo and its findings of fact for substantial evidence." (*People v. Trinh* (2014) 59 Cal.4th 216, 236.) The interpretation of a statute is subject to de novo review on appeal. (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916.) "In interpreting a voter initiative like [Proposition 47], [the courts] apply the same principles that govern statutory construction." (*People v. Rizo* (2000) 22 Cal.4th 681, 685.) " 'The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. [Citations.]' " (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276.) "In determining intent, we look first to the words themselves. [Citations.] When the language is clear and unambiguous, there is no need for construction. [Citations.] When the language is susceptible of more than one reasonable interpretation, however, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. [Citations.]" (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1007-1008.)

Defendant's argument incorrectly allocates the burden of proof on the value of the stolen property to the prosecution. Section 1170.18 is silent on this question, but as the

People correctly argue, and as defendant concedes, defendant bore the burden of establishing that the value of the stolen property did not exceed $950, as held by *People v. Sherow* (2015) 239 Cal.App.4th 875 (*Sherow*) and *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444 (*Rivas-Colon*). Indeed, as defendant acknowledges, this court has followed the holding of *Sherow* and *Rivas-Colon*, as well as other appellate courts, in rejecting defendant's position and concluding a petitioner moving for relief under section 1170.18 has the initial burden to establish his eligibility for resentencing, including, in the case of a theft offense, the burden to prove the value of the property did not exceed $950. (*People v. Johnson* (2016) 1 Cal.App.5th 953, 964-965[Fourth Dist., Div. One]; *People v. Bush* (2016) 245 Cal.App.4th 992, 1007-1008 [Fourth Dist., Div. Two]; *People v. Perkins* (2016) 244 Cal.App.4th 129, 136-137 [Fourth Dist., Div. Two] (*Perkins*); *Rivas-Colon*, *supra*, at pp. 449-450 [First Dist., Div. Five]; *Sherow*, *supra*, at pp. 878-880 [Fourth Dist., Div. One].)

In *Sherow*, *supra*, 239 Cal.App.4th 875, the defendant had been convicted of nine counts of second degree burglary and, on appeal, he challenged the trial court's refusal to resentence him on two of these counts. (*Id*. at p. 877.) He contended that the record did not demonstrate that the loss on these counts exceeded $950 "and thus the two counts should be resentenced as misdemeanors," and that the prosecution had the burden of proving he was not eligible for resentencing. (*Id*. at pp. 877-878.)

Our Division One colleagues observed that Proposition 47 does not explicitly allocate a burden of proof. (*Sherow*, *supra*, 239 Cal.App.4th at p. 878.) The court

pointed out, "As an ordinary proposition: ' "[A] party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense he is asserting." ' [Citations.]" (*Id*. at p. 879.) The court held that the petitioner "must establish his or her eligibility" for such relief and has the "initial burden of proof" to "establish the facts upon which his or her eligibility is based." (*Id*. at pp. 878-880.) In making such a showing, "[a] proper petition could certainly contain at least [the petitioner's] testimony about the nature of the items taken." (*Id*. at p. 880.)

In *Rivas-Colon, supra*, 241 Cal.App.4th 444, the First District cited *Sherow, supra*, 239 Cal.App.4th 875, when rejecting the defendant's argument that the prosecution had the burden of establishing the value of the property exceeded $950. (*Rivas-Colon*, at p. 449.) The defendant in *Rivas-Colon* had stipulated to a factual basis for the plea contained in the police report, which listed the value of the property he removed from a store as $1,437.74. (*Id*. at p. 447.) The appellate court explained that the defendant had not provided any evidence or argument demonstrating that he was eligible for resentencing and therefore the trial court properly denied his resentencing petition. (*Id*. at p. 449-450.)

We agree with the reasoning in both *Sherow* and *Rivas-Colon*. As we explained in *Perkins, supra*, 244 Cal.App.4th at pages 136-137, these courts' analyses are consistent with the well-established rule set forth in Evidence Code section 500, which reads: "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is

asserting." (See *People v. Atwood* (2003) 110 Cal.App.4th 805, 812 [under Evidence Code section 500, "[t]he burdens of producing evidence and of persuasion flow from a party's status as a claimant seeking relief"]; *People v. Barasa* (2002) 103 Cal.App.4th 287, 295-296 [under Evidence Code section 500, defendant has the burden of proving that his drug possession or transportation was for personal use and that he was therefore eligible for sentence reduction under Proposition 36].)

Here, defendant is the party who petitioned for relief, and therefore he had the initial burden of demonstrating eligibility under section 1170.18, subdivision (a). (*Perkins*, *supra*, 244 Cal.App.4th at pp. 136-137 ["The defendant must attach information or evidence necessary to enable the court to determine eligibility."].) Defendant's assertion in the petition about the vehicle's value, without any evidence supporting it, is insufficient to establish the vehicle's value.[5] Instead, a proper resentencing petition "could certainly contain at least [defendant's] testimony about the nature of the items taken" (*Sherow*, *supra*, 239 Cal.App.4th at p. 880), or "provide the superior court with information that would allow the court to 'determine whether the petitioner satisfies the criteria in subdivision (a).' (§ 1170.18, subd. (b).)" (*Perkins*, *supra*, 244 Cal.App.4th at p. 137.) If the petition makes a sufficient showing, the trial court "can take such action as appropriate to grant the petition or permit further factual determination." (*Sherow*, *supra*, 239 Cal.App.4th at p. 880.)

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[5] Defendant merely checked the box in his petition stating: "Defendant believes the value of the check or property does not exceed $950."

Defendant claims *Sherow* and its progeny were wrongly decided and we should decline to follow them because they conflict with the principles regarding allocation of the burden of proof set forth in *People v. Guerrero* (1988) 44 Cal.3d 343 (*Guerrero*). According to defendant, *Guerrero* dictates that, in "determining whether a prior conviction currently qualifies as a strike," the prosecution bears the burden of establishing the petitioner is ineligible for relief. He further reasons that applying this rule is "appropriate for Proposition 47 cases." Defendant further argues that the due process clause supports imposing the burden of proof on the prosecution.

Defendant's discussion of evidentiary presumptions and the burden of proof, based on *Guerrero, supra*, 44 Cal.3d at p. 352, and related cases, does not persuade us to reject *Sherow*. In *Guerrero*, the Supreme Court addressed the issue of the type and scope of evidence that is allowed to prove a prior serious felony conviction allegation at a criminal trial. On that issue, the court held: "[I]n determining the truth of a prior-conviction allegation, the trier of fact may look to the entire record of the conviction," rejecting the rule that only "matters necessarily established by the prior judgment of conviction" may be considered. (*Guerrero*, at pp. 345, 348-356.) The court also noted, "but when the record does not disclose any of the facts of the offense actually committed, the court will presume that the prior conviction was for the least offense punishable under the foreign law." (*Id*. at pp. 354-355.)[6]

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[6] Since the United States Supreme Court's decision in *Apprendi v. New Jersey* (2000) 530 U.S. 466, the crime and sentence enhancements are "the 'functional

We find the distinct statutory schemes and issues that were involved in *Guerrero* to be unhelpful in examining Proposition 47. In *Guerrero*, the California Supreme Court recognized courts have applied a presumption in favor of the least offense punishable where the prosecution sought to enhance a current sentence based on the facts of a prior case. In such cases, the prosecution has the burden of establishing enhancements apply. (*People v. Towers* (2007) 150 Cal.App.4th 1273, 1277 ["The prosecution bears the burden of proving beyond a reasonable doubt that a defendant's prior convictions were for either serious or violent felonies"].) As a result, any failure of evidence defeats the ability of the prosecution to meet its burden to show the prior offense was subject to greater punishment, triggering an enhancement. By contrast, Proposition 47 relief is a statutorily created grant of leniency by the electorate. Here, as we have discussed, defendant is seeking relief pursuant to Proposition 47 for a conviction already proven beyond a reasonable doubt. Defendant therefore must carry the burden of showing eligibility.

Moreover, due process does not allocate the burden of proof to the People in the context of section 1170.18 petitions. "The difficulty with a due process argument based on the prosecutor's burden of proof in the initial prosecution for an offense is that the resentencing provisions of Proposition 47 deal with persons who have already been proved guilty of their offenses beyond a reasonable doubt. Under this remedial statute, a

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[footnote continued from previous page]
equivalent' of a single 'greater' crime. [Citation.]" (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.)

petitioner is claiming the crime for which the person has been convicted would be a misdemeanor if tried after the enactment of the proposition." (*Sherow, supra,* 239 Cal.App.4th at p. 880.)

Defendant also reasons that *Sherow*'s holding is contrary to public policy because it is much easier for the prosecution, which investigated the offense, to show the value of the stolen vehicle. This argument was rejected in *Sherow*. Indeed, as previously noted, *Sherow* stated that a defendant "knows what kind of items he took," and his petition "could certainly contain at least [his] testimony about the nature of the items taken." (*Sherow, supra*, 239 Cal.App.4th at p. 880.)

We find convincing *Sherow*'s reasoning that, because a Proposition 47 petitioner is making an affirmative claim for relief, he has the burden of proof as to each fact that is essential to his or her claim. (*Sherow*, *supra*, 239 Cal.App.4th at p. 875.) Further, we agree with *Sherow* that placing the burden of proof on a Proposition 47 petitioner does not violate due process principles. (*Id*. at pp. 875-876.)

Defendant's petition did not include the value of the stolen vehicle involved in his offense. In addition, there is no evidence in the record to determine the value.[7] Because defendant "provided no information whatsoever on the nature and value of the stolen property to aid the superior court in determining whether [he] is eligible for resentencing," the court could not " 'determine whether the petitioner satisfie[d] the

[7] We reject defendant's claim that because defendant's crime occurred in 1989 and involved a 1980 pickup truck, there is "at least some reasonable likelihood" the value of the vehicle in "2015," now 2016, is less than $950.

criteria in subdivision (a).' (§ 1170.18, subd. (b).)" (*Perkins, supra*, 244 Cal.App.4th at p. 137.) Accordingly, defendant did not satisfy his burden of proof, and we affirm the trial court's denial of defendant's Proposition 47 petition.

III

DISPOSITION

The trial court's order denying defendant's Proposition 47 petition is affirmed without prejudice to consideration of a petition properly supported by a showing that he is eligible for resentencing in accord with Proposition 47.

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RAMIREZ
P. J.

We concur:

MILLER
J.

CODRINGTON
J.